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No. 82-55

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

CITY OF WEST HELENA, ARKANSAS, *et al.*,
Appellants,

v.

REVEREND P. L. PERKINS, *et al.*

On Appeal from the United States Court of Appeals for the Eighth Circuit

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MOTION TO DISMISS OR AFFIRM

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* P. A. HOLLINGSWORTH
JANET L. PULLIAM
Suite 955, Tower Building
Little Rock, Arkansas 72201
(501) 372-0400

WILLIAM L. ROBINSON
NORMAN J. CHACHKIN
DEBRA A. MILLER
Lawyers' Committee for
Civil Rights Under Law
733 15th Street, N.W.
Suite 520
Washington, D.C. 20005
(202) 628-6700

Attorneys for Appellees

* Counsel of Record

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

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MOTION TO DISMISS OR AFFIRM

Appellees respectfully move, pursuant to Sup. Ct. Rule 16.1(a), (c), and (d), that the Court dismiss this appeal because it lacks jurisdiction thereof since no state statute or local ordinance was held invalid by the court below; or in the alternative, that the Court summarily affirm the judgment below because no susbtantial federal questions requiring further development or oral argument are presented since the case is governed by, and the ruling below is fully consistent with, the decision in *Rogers v. Lodge*, 50 U.S.L.W. 5041 (U.S., July 1, 1982). The judgment of the Court of Appeals for the Eighth Circuit is also subject to affirmance because it is manifestly correct under

§ 2 of the Voting Rights Act of 1965, as amended by § 3 of P.L. 97-205, 96 Stat. 131 (1982), which is now applicable to this case. Finally, treating the Jurisdictional Statement as a Petition for Writ of Certiorari, *see* 28 U.S.C. § 2103; *Doran v. Salem Inn., Inc.*, 422 U.S. 922, 927 (1975), the writ should be denied.

STATEMENT

This suit was filed in 1978, challenging the adoption and continuation of at-large elections for aldermen (city council members) in West Helena, Arkansas. Plaintiffs (appellees here) claimed that this election scheme dilutes the voting strength of the city's Black community in violation of section 2 of the Voting Rights Act of 1965, 42 U.S.C. § 1973, and the Fourteenth and Fifteenth Amendments to the United States Constitution. The case was tried in the fall of 1980, and the district court issued its decision on April 10, 1981 (App. 36-37,[1] 514 F. Supp. 770).

Relying upon *City of Mobile v. Bolden*, 446 U.S. 55 (1980), the trial court rejected plaintiffs' Fifteenth Amendment claim on the ground that no direct interference with the right to cast a ballot had been demonstrated (App. 60, 514 F. Supp. at 780) and plaintiffs' statutory claim on the ground that § 2 of the Voting Rights Act was coextensive with the Fifteenth Amendment (*id.*). The district court also rejected plaintiffs' Fourteenth Amendment claim of vote dilution because, in its view, plaintiffs had failed to prove that the at-large election system was adopted or maintained "to effect or perpetuate racial discrimination" (App. 62, 514 F. Supp. at 781).

On appeal, a panel of the Eighth Circuit unanimously reversed (App. 1-35, 675 F.2d 201). The panel accepted

[1] Citations in this form refer to the Appendix to the Jurisdictional Statement filed herein.

the lower court's conclusion that West Helena did not adopt at-large voting in 1920 for the purpose of racial discrimination. However, it held "clearly erroneous" the district judge's finding that West Helena's adherence to the at-large system was free of discriminatory intent (App. 34, 675 F.2d at 216) and ruled that plaintiffs' showing of the city's discriminatory motivation for retaining at-large elections established violations of § 2 of the Voting Rights Act and of the Fifteenth Amendment, as well as of the Fourteenth Amendment to the United States Constitution (App. 11-12 & nn.5, 6, 14 n.8, 34, 675 F.2d at 205-06 & nn.5, 6, 207 n.8, 216).

Most of the relevant facts are set out in the opinions below, which are reprinted in the appendix to the Jurisdictional Statement (App. 1-35, 36-47). Appellants' "Statement of the Case," however, not only lacks any citation to the record; it also omits important elements of the proof introduced below and of the findings made by the trial court. We treat most of these matters in the course of the Argument, *infra*. It is important here to stress only the failure of appellants to acknowledge the extent to which the Black community in West Helena has been prevented from electing candidates of its choice to the city council. Appellants' recitation that "[b]etween 1966 and 1978, twelve blacks have been candidates for council positions and three have been elected" (J.S. 7 [2]) is a convenient but gross understatement. In fact, only three Blacks have served on the city council since West Helena was incorporated in 1917 (App. 41, 44, 514 F. Supp. at 772, 773) and each was able to be elected only in contests in which he faced more than a single white opponent (App. 46, 514 F. Supp. at 774; Tr. 53,[3] 68, 129, 258). Whenever a Black has run for an aldermanic position, there has been consistent racial bloc voting which

[2] Citations in this form are to the Jurisdictional Statement.

[3] Citations to "Tr. ——" refer to the transcript of proceedings before the district court on September 29 and 30, 1980.

prevents a Black candidate from winning in a head-to-head contest against a white opponent (App. 46, 514 F. Supp. at 774; Tr. 57, 109, 136, 248, 300).[4] In remarks at the conclusion of the trial, the district court recognized how at-large voting presents Blacks in West Helena with a "loaded game board" [5] (Tr. 464-65):

> . . . under the present system I think it does work, because of the block voting, to decrease a black person's chance of being elected to the City Council. I don't think there's any question about that . . .
>
> . . .
>
> Now, I can understand that the election system as a whole, the electing at large, can be used as a tool to effectively cut out black representation on the Council. And I guess the question is whether or not there was a deliberate intent that was carried out to do that in this case that over-balances or outweighs the benefits of having people reside in wards and stand for election as a whole.

While there is no majority-vote-to-win requirement, the ward residency and numbered-place provisions promote head-to-head contests in West Helena between Black and white candidates (App. 25, 675 F.2d at 212; *cf.* App. 62, 514 F. Supp. at 781 (head-to-head contests "not inevitable")).[6]

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[4] The city refers to the 1980 appointment of a Black to fill a council vacancy (J.S. 7); not only was this action taken long after this lawsuit was filed, but it was also the first instance in the city's history of a Black receiving a vacancy appointment (Tr. 128).

[5] *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 28 (1971).

[6] The impediment to Black representation on the council created by the at-large system with residency and place requirements has also contributed to low rates of participation by Blacks in the political affairs of the city because of the feeling that votes in city-wide elections served no purpose (Tr. 198; App. 47, 514 F. Supp. at 775).

ARGUMENT

I. This appeal should be dismissed because this Court lacks jurisdiction under 28 U.S.C. § 1254(2).

Appellants claim this Court has appellate jurisdiction to review the holding of the Eighth Circuit pursuant to 28 U.S.C. § 1254(2), and that its jurisdiction "is supported by *Doran v. Salem Inn, Inc.*, 422 U.S. 922 (1975); *New Orleans v. Dukes*, 427 U.S. 297 (1976)" (J.S. 2). These cases are inapposite and there is no basis for the construction which appellants would give to § 1254(2). This appeal must be dismissed for want of jurisdiction.

Section 1254(2) provides that this Court shall have appellate jurisdiction over cases from the United States Courts of Appeals where the appellant "rel[ies] on a State statute held by a court of appeals to be invalid as repugnant to the Constitution, treaties or laws of the United States . . . ." The instant appeal is prosecuted by the City of West Helena and several of its officers (defendants in the trial court),[7] but it cannot be said either that appellants are "relying on a State statute" nor that any enactment was "held by a court of appeals to be repugnant to the Constitution, treaties or laws of the United States."

Nowhere in their description of the "substantial question" presented by this appeal (*see* J.S. 9-13) do appellants even advert to, much less rely upon, any state statute or local ordinance.[8] Under Ark. Stat. Ann. § 19-

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[7] The State of Arkansas was a party below, having intervened as a defendant "for the sole purpose of defending constitutionality of challenged Arkansas statutes." Brief of Appellee, State of Arkansas, *Perkins v. City of West Helena*, 8th Cir. No. 81-1516, at 2. The State of Arkansas has not appealed from the ruling of the Eighth Circuit.

[8] We recognize that ordinances have been treated as the equivalent of state statutes for purposes of 28 U.S.C. § 1254(2). *E.g.*, *New Orleans v. Dukes* and *Doran v. Salem Inn, Inc.*, cited by appellants. However, appellants fail to identify any local ordinance

1002.7 (Repl. 1980) (J.S. 5), which has been applicable throughout the course of this litigation (App. 43-44, 514 F. Supp. at 773), the decision whether to retain at-large elections for city council positions in West Helena is the city council's alone; the Arkansas statute authorizes either at-large or ward elections, at the option of the city.[9] For this reason, appellants have never, in this litigation, defended their continuation of at-large city council elections by claiming that such contests are required or favored by any state law.

Similarly, appellants do not identify where in its opinion the court below "held [a state statute or ordinance] repugnant to the Constitution, treaties or laws of the United States." Although the Court of Appeals properly considered the actual operation of the West Helena city council voting scheme, including elements attributable to state law (App. 25, 675 F.2d at 212), its opinion contains no statement that any statute or ordinance is invalid. In the absence of a clear indication to this effect, this Court would appear to lack jurisdiction under § 1254(2). *See Minnesota v. Alexander*, 430 U.S. 977 n.1 (1977) (Stevens, J., dissenting).

Furthermore, the ruling below does not amount to holding any law invalid as applied. Since the state law does not, by its terms, mandate the use of only at-large elections in West Helena, this suit is distinguishable from *City of Mobile v. Bolden*, 446 U.S. 55, 59-60 (1980) and *Rogers v. Lodge*, 50 U.S.L.W. 5041, 5041-42 (U.S., July 1, 1982). In those cases, this Court had appellate jurisdiction from decisions of the Fifth Circuit because invalidation of the at-large voting systems of Mobile and

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of the City of West Helena upon which they seek to rely, or which was held invalid by the Court of Appeals.

[9] The parties stipulated that "[t]he State of Arkansas has no legislative policy which prefers at-large elections" (App. 44, 514 F. Supp. at 773).

Burke County necessarily implied a holding that state statutes requiring at-large voting were, at least as applied to the two localities, inconsistent with federal law. *See, e.g., Malone v. White Motor Corp.*, 435 U.S. 497, 499 (1978); *Detroit v. Murray Corp.*, 355 U.S. 497, 499 (1958).

Finally, no West Helena ordinance of any kind is involved in this case and none was held invalid either explicitly or by implication. The most which can be said is that West Helena's *failure to adopt an ordinance* for ward elections was a key factor in the Court of Appeals' determination that unconstitutional conduct had occurred. To be sure, this case would be in a different posture if the Arkansas law had required ward elections in the absence of a local ordinance providing for at-large contests, and if the city council of West Helena had adopted such an ordinance. Plaintiffs-appellees would in such circumstances, of necessity, be challenging the constitutionality of an ordinance, and the Court of Appeals' decision would be reviewable here by way of appeal. *See* note 8 *supra*. This does not, however, furnish a basis for appellate jurisdiction over the present case. The statutes defining this Court's obligatory jurisdiction are strictly construed. *E.g., Fornaris v. Ridge Tool Co.*, 400 U.S. 41, 42 n.1 (1970) (holding Court had no appellate jurisdiction over decision of federal court of appeals invalidating statute of Puerto Rico).

For these reasons, the appeal should be dismissed for lack of jurisdiction.

II. The judgment below should be affirmed or certiorari should be denied inasmuch as no substantial question warranting plenary review is presented in this case.

If the Court agrees that it lacks appellate jurisdiction over this matter and dismisses the city's appeal, it must nevertheless consider whether review by way of *certiorari* would be appropriate. 28 U.S.C. § 2103; *see Doran v.*

Salem Inn, Inc., 422 U.S. 922, 927 (1975). We submit that because no substantial issues warranting further briefing or oral argument have been raised by the city, the Court should not grant the writ. These same considerations compel summary affirmance of the judgment below if the Court sustains appellate jurisdiction under 28 U.S.C. § 1254(2).

A.

West Helena argues essentially that because of minor factual differences between this case and *White v. Regester*, 412 U.S. 755 (1973) or *Rogers v. Lodge*, 50 U.S.L.W. 5041 (U.S., July 1, 1982), the judgment below is erroneous.[10] This approach to adjudication trivializes the function of the Court. Because the Eighth Circuit

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[10] For example, appellants emphasize that West Helena's at-large system does not include a majority-vote requirement, as did those in Dallas, Bexar and Burke Counties (J.S. 11). It is significant, however, that each time a Black was elected to the West Helena council because the white vote was split between two white candidates, the Black was then defeated for reelection in a head-to-head contest against a single white opponent (App. 46, 514 F. Supp. at 774). Moreover, in weighing "the totality of the circumstances to determine whether the at-large electoral system was created or maintained to accord the members of the allegedly injured group less opportunity than other voters to participate meaningfully in the political process and elect legislators of their choice" (App. 18, 675 F.2d at 209), the Court of Appeals recognized that the absence of a majority-vote requirement "decrease[d] the likelihood that West Helena's electoral system is being maintained for a discriminatory purpose" (App. 23, 675 F.2d at 211). But it properly held that this single factor was not dispositive and concluded, "[o]n the basis of the direct and circumstantial evidence in this case," "[a]fter carefully reviewing the record and briefs, and hearing oral argument," that the at-large system was being maintained for discriminatory purposes and that the district court's contrary finding was "clearly erroneous" (App. 34, 675 F.2d at 216).

Appellants also urge that *Rogers* is distinguishable because no Black had ever been elected to the Burke County commission, while three Black persons have won single terms on the West Helena city council (J.S. 11, 12). Clearly, however, an at-large system need not be so efficient as to exclude minority candidates completely in order

correctly applied the legal principles announced in earlier cases and confirmed in *Rogers*, its judgment should not be disturbed.

The central issue in this case, through trial and appeal, was whether at-large elections in West Helena—which admittedly make it difficult for the Black community to elect representatives of their choosing—were adopted initially or were currently being retained for

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to be condemned under the Fourteenth Amendment. In *White v. Regester*, 412 U.S. at 766, 768-69, this Court noted that two Blacks from Dallas and five Mexican-Americans from Bexar County had served in the Texas legislature. Nevertheless, the multi-member legislative districts involved in that case were held to violate the Constitution by diluting the voting strength of minorities, who had "*less* opportunity than did other residents in the district to participate in the political processes and to elect legislators of their choice." 412 U.S. at 766 (emphasis added).

West Helena's focus upon narrow factual distinctions between this case and *White* or *Rogers* recalls the discredited view that proof of some combination of enumerated factors, without more, will establish a constitutional violation—the very interpretation of *Zimmer v. McKeithen*, 458 F.2d 1297 (5th Cir. 1973), *aff'd on other grounds sub nom. East Carroll Parish School Bd. v. Marshall*, 424 U.S. 636 (1975) (*per curiam*) which was rejected by this Court—*see Rogers v. Lodge*, 50 U.S.L.W. at 5043. The approach of the court below was consistent with *Rogers*:

> The absence or presence of some, or all, of the *Zimmer* factors, however, is not conclusive of the discriminatory purpose issue. . . .
>
> . . . In determining whether a discriminatory purpose existed, no set of factors, including those suggested in *Zimmer* and *Arlington Heights*, is dispositive of the question of intent. Moreover, even if all of the *Zimmer* and *Arlington Heights* factors are established, an inference of discriminatory intent is not necessarily to be drawn. The district court must consider the totality of circumstances to determine whether the at-large electoral system was created or maintained to accord the members of the allegedly injured group less opportunity than other voters to participate meaningfully in the political process and elect legislators of their choice.

(App. 17-18, 675 F.2d at 208-09.)

racially discriminatory purposes. The district court viewed the evidence as insufficient to establish discriminatory intent, describing its holdings as "legal conclusions" (App. 61-62, 514 F. Supp. at 781-82). The Court of Appeals reversed with respect to the city's continued adherence to at-large elections. It both found legal error affecting the trial judge's evaluation of the proof and also concluded that the ultimate holding of no invidious purpose was a "clearly erroneous" finding. *Cf. Pullman-Standard Co. v. Swint*, 50 U.S.L.W. 4425 (U.S., April 27, 1982).

1. The district court made extensive findings of unresponsiveness by the city council to the legitimate desires and needs of the Black community (App. 50-55, 514 F. Supp. at 776-78),[11] but it gave almost no weight to this evidence—based upon its reading of the plurality opinion in *Bolden* (App. 62, 514 F. Supp. at 782). The Court of

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[11] Appellants seek to minimize the extensive record evidence of the council's refusal to address the needs of West Helena's Black community by asserting that "the black wards have received approximately $357,000 more in improvement funds than have the white wards" (J.S. 7). The evidence on street improvements (from which this figure was apparently derived) does not establish what the city seeks to imply: that these funds were expended only in Black residential areas of Wards 1 and 4. The evidence presented by the city to the trial court did not distinguish between expenditures in predominantly Black and predominantly white residential areas within the wards (Tr. 350-51; *see* Tr. 369-70). In any event, differential current expenditures of this magnitude would merely confirm the severe neglect of Black residential areas by West Helena's governing body in the past (App. 21, 675 F.2d at 210-11; App. 53, 514 F. Supp. at 777; *see* Tr. 52, 69-70, 91, 96-100, 118, 148-67, 268, 277-78, 311, 315-16, 382-83, 461).

Moreover, 70% of expenditures for street improvements during the time period covered by the city's exhibits, as the district court noted, were from federal grant funds rather than local revenues (App. 53, 514 F. Supp. at 777). Obtaining an equitable share of municipal services is an important reason why Blacks seek political office in West Helena (Tr. 52, 148-54; App. 48-49, 54-55, 514 F. Supp. at 775, 778).

Appeals recognized that such evidence *is* "probative of a finding that the at-large system is being maintained for a discriminatory purpose" (App. 21-22, 675 F.2d at 211), and its approach is confirmed by the majority opinion in *Rogers*, 50 U.S.L.W. at 5044 & n.9 (unresponsiveness "increases the likelihood that the political process was not equally open to blacks").

The Court of Appeals also rejected the district judge's conclusion that "[all] [c]itizens of West Helena register and vote in municipal elections for the candidates of their choice *without hindrance* . . ." (App. 61, 514 F. Supp. at 781) (emphasis added) because it was inconsistent with the trial court's subsidiary factfinding about impediments to Black participation in the political processes of West Helena (App. 18-20, 675 F.2d at 209-10). This is certainly unexceptionable performance of the task of an appellate court. *Dayton Bd. of Educ. v. Brinkman*, 443 U.S. 526, 534-36 & n.8 (1979).

Perhaps most significant, the Court of Appeals thoroughly canvassed the record evidence bearing upon the reasons why the city council refused to switch to ward elections when it was petitioned to do so by the Black community in 1977. It concluded that the district judge had erred in accepting after-the-fact rationalizations described in the trial testimony of the current and former Mayors of West Helena[12] (App. 27-30, 675 F.2d at 213-14). The Court of Appeals' determination is strongly supported by the direct evidence in the record: the official council minutes from 1977 contain one alder-

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[12] Jesse Porter, the Mayor of West Helena from 1952 to 1979, testified that at-large elections were preferable to ward elections in terms of producing a council responsive to all citizens and interests (Tr. 380). But Porter did not vote on the issue in 1977 (*see* PX 37; App. 57 n.22, 514 F. Supp. at 779 n.22). He also testified that throughout his entire administration, both the Mayor and council had always been responsive to the Black community (Tr. 387); of course, the district judge found, and appellants concede, to the contrary (J.S. 7, 10; App. 50-55, 514 F. Supp. at 776-78).

man's statement opposing ward elections because "I do not think you would have fair representation as far as white people are concerned with the four wards" (PX 37, *see* App. 57 n.22, 514 F. Supp. at 779 n.22); a current alderman—who lost to a Black candidate in a three-way race in 1976 and regained his seat by defeating the same Black candidate in a head-to-head race in 1978 (Tr. 129-36)—testified that he opposed the ward election system because "there's more black people that live in the ward that I live in than white people" (Tr. 248, quoted at App. 28-29, 675 F.2d at 214); the request for ward elections was presented to the council as one of a list of grievances involving racial discrimination against Blacks in West Helena, in the midst of a peaceful boycott by the Black community [13] (*see* App. 48, 514 F. Supp. at 775). Active West Helena political figures who appeared at the trial, Black and white, testified that the city's racial residential segregation and its pattern of racial bloc voting were well known, and that in combination with the at-large system gave white voters the power to prevent the election of Blacks (Tr. 53, 57, 109, 130-32, 248, 258, 300, 389, 291, 449-50).

2. When such intermediate legal and factual mistakes were corrected by the Court of Appeals, it was left with a record which could not sustain the district court's ultimate determination respecting discriminatory intent. Giving appropriate probative weight to evidence the lower court had ignored, and viewing the "totality of the circumstances," the Court of Appeals held that ultimate finding was "clearly erroneous" (App. 34, 675 F.2d at 216). Contrary to appellants' claim (J.S. 12), this was not improper. As we have demonstrated, and unlike *Pullman-Standard Co. v. Swint*, *see* 50 U.S.L.W. at 4428, 4430 & n.21, the court below carefully assessed all of the subsidiary fact-finding by the trial court, giving appropriate

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[13] *See NAACP v. Claiborne Hardware Co.*, 50 U.S.L.W. 5122 (U.S., July 2, 1982).

deference to findings which were adequately supported and making necessary modifications and corrections to findings which were not, before passing upon the central issue of discriminatory intent. *See Rogers v. Lodge*, 50 U.S.L.W. at 5044. Since the Eighth Circuit panel faithfully applied the "clearly erroneous" standard, *Dayton Bd. of Educ. v. Brinkman*, 443 U.S. at 534 n.8, and since its conclusions are fully consistent with *Rogers v. Lodge*, this case presents no substantial issues justifying a grant of certiorari or further briefing and oral argument.

B.

The need for plenary review in this case is further diminished by the recent passage of the Voting Rights Act Amendments of 1982, P.L. 97-205, 96 Stat. 131 (1982). The text and legislative history of that statute demonstrate that the changes it makes to § 2 of the Voting Rights Act were intended to apply to pending cases and also that they were designed to eliminate the necessity for proving "discriminatory intent" in order to establish a § 2 violation.

Section 3 of the measure, 96 Stat. at 134, amends § 2 of the Voting Rights Act of 1965, 42 U.S.C. § 1973, to provide as follows:

> (a) No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color, or in contravention of the guarantees set forth in section 4(f)(2), as provided in subsection (b).
>
> (b) A violation of subsection (a) is established if, based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) in that its

> members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice. The extent to which members of a protected class have been elected to office in the State or political subdivision is one circumstance which may be considered: *Provided*, That nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population.

Both courts below were in agreement that at-large voting for aldermen gives the Black citizens of West Helena "less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice." They differed only on the question whether plaintiffs had proved that the at-large system was being retained for discriminatory purposes. Therefore, under § 2 as now amended, the judgment below is unquestionably correct and due to be affirmed.

1. In *City of Mobile v. Bolden*, 446 U.S. 55, 61 (1980), the plurality interpreted § 2 of the Voting Rights Act (prior to its 1982 amendment) as "intended to have an effect no different from that of the Fifteenth Amendment itself." Because the plurality read the Fifteenth Amendment to proscribe only voting limitations motivated by discriminatory intent, *id.* at 61-64, it applied the same standard to § 2. However, the recent amendment adds critical language giving the statute substantial independent significance. First, in subsection (a), which was previously the entire text of § 2, the amendment changes the phrase "to deny or abridge the right of any citizen of the United States to vote on account of race or color" to read as follows (emphasis added):

> *in a manner which results in* a denial or abridgement of the right of any citizen of the United States to vote on account of race or color, or in contravention of the guarantees set forth in section 4(f)(2), *as provided in subsection (b)*.

Second, the amendment adds an entire new subsection (b) describing how a violation of § 2 is to be established (quoted *supra* pp. 13-14). Thus, the language of § 2, as amended in 1982, is far different from that of the Fifteenth Amendment. The statutory language emphasizes results, not intent, and calls for a judgment based upon the totality of the circumstances rather than proof of discriminatory motivation as an essential element.

2. The legislative history of the 1982 enactment demonstrates that this shift in legal standards was a primary goal of the Congress. The Senate Report on the bill [14] states, under the heading "PURPOSE":

> S. 1992 amends Section 2 of the Voting Rights Act of 1965 to prohibit any voting practice, or procedure results [*sic*] in discrimination. This amendment is designed to make clear that proof of discriminatory intent is not required to establish a violation of Section 2. It thereby restores the legal standards, based on the controlling Supreme Court precedents, which applied in voting discrimination claims prior to the litigation involved in *Mobile v. Bolden*. The amendment also adds a new subsection to Section 2 which delineates the legal standards under the results test by codifying the leading pre-*Bolden* vote dilution case, *White v. Regester*.

S. Rep. No. 97-417, 97th Cong., 2d Sess. 2 (1982) (footnotes omitted). The Report contains an extensive discussion of the Section 2 changes (*id.* at 15-43), explicitly repudiating the "intent" test. Significantly, the Senate Judiciary Committee rejected an amendment to the bill which "would have prevented the existence of an at-large

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[14] The Senate debated and amended the bill reported out by the Judiciary Committee, S. 1992, and then incorporated it into the House bill, H.R. 3112, as a substitute. 128 Cong. Rec. S7139 (daily ed., June 18, 1982). The House then passed the Senate-amended bill, *id.* at H3839-46 (daily ed., June 23, 1982).

election system from being considered as evidence of a violation of Section 2 of the Act," *id.* at 4.

Senator Mathias, acting as manager, introduced the measure when it reached the Senate floor and stated that "[t]his amendment is designed to make clear that proof of discriminatory intent is not required to establish a violation of section 2." 128 Cong. Rec. S6941 (daily ed., June 17, 1982). Later in the debate on that same day, Senator East sought to strike the amendments to § 2 of the Voting Rights Act from the measure in order to restore the "intent" test (*id.* at S6956):

> . . . I would characterize the first amendment I offer as the most significant, substantive one. It addresses an issue of nationwide concern. Specifically, Mr. President, it deals with Section 2 of S. 1992 under which, Mr. President, we would no longer use an intent test of [*sic*] determine whether there has been wrongdoing within the meaning of the civil rights law but would use an effects or results test.
>
> Mr. President, this is a very intriguing departure from the normal way we have protected the right to vote under the 15th amendment.
>
> . . .
>
> My concern is that a wholly new approach to voting is being created under section 2.

Senator East's proposed amendment to the bill was defeated (*id.* at S6965).

In similar fashion, when the Senate-passed bill was considered by the House, the effect of the Section 2 amendments was emphasized. Rep. Edwards, the floor manager, said that the "amendment is designed to make clear that proof of discriminatory intent is not required to establish a section 2 violation. In fact, the imposition of an intent standard under section 2 has been specifically and decisively rejected by both the House and the Senate." *Id.* at H3841 (daily ed., June 23, 1982). Rep. Sensenbrenner was even more explicit (*id.*):

> Let there be no question then. We are writing into law our understanding of the test in White against Regester. And our understanding is that this looks only to the results of a challenged law, in the totality of the circumstances—with no requirement of proving purpose. But should the Highest Court in the land—or a majority of the Court—conclude there is a purpose element in White, then the committee nonetheless has drafted a bill that does not incorporate this requirement, and that is the ultimate legislative intent of the bill we are adopting here today.

There is thus no room to doubt the substantial shift worked by the 1982 Act.

Furthermore, under established principles, the new statute governs disposition of this case. *Bradley v. School Bd. of Richmond*, 416 U.S. 696 (1974); *Thorpe v. Housing Auth. of Durham*, 393 U.S. 268 (1969); *United States v. Schooner Peggy*, 5 U.S. (1 Cr.) 49 (1801). Prior to its passage by the House of Representatives, application of the new § 2 standards to pending cases was specifically brought to the attention of that body by Rep. Sensenbrenner (128 Cong. Rec. at H3841):

> Section 2, unlike the bailout procedure added by this bill, will take effect immediately and will, of course, apply to pending cases in accordance with the well-established principles of *Bradley v. City of Richmond*, 416 U.S. 686 (1974) and *United States v. Alabama*, 362 U.S. 602 (1960).

See Hutto v. Finney, 437 U.S. 678, 694 n.23 (1978).[18]

As we pointed out above, since both courts below found that at-large voting impeded the ability of Blacks in West Helena to elect representatives of their choice, when the new § 2 is applied to this case, affirmance of the judgment below is compelled.

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[18] The Voting Rights Act Amendments of 1982 were signed by the President on June 29, 1982.

CONCLUSION

For the foregoing reasons, the appeal should be dismissed and, treating the papers as a petition, the writ of certiorari should be denied; or in the alternative, the judgment below should be affirmed.

Respectfully submitted,

* P. A. HOLLINGSWORTH
JANET L. PULLIAM
Suite 955, Tower Building
Little Rock, Arkansas 72201
(501) 372-0400

WILLIAM L. ROBINSON
NORMAN J. CHACHKIN
DEBRA A. MILLER
Lawyers' Committee for
Civil Rights Under Law
733 15th Street, N.W.
Suite 520
Washington, D.C. 20005
(202) 628-6700

Attorneys for Appellees

* Counsel of Record